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February 11, 2011

SENT VIA EMAIL ONLY: wtharbaugh@gmail.com

Professor William Harbaugh
538 PLC
1285 University of Oregon
Eugene, OR 97403-1285

Re: Petition for Review of Denial of Fee Waiver:
Oregon University System

Dear Professor. Harbaugh:

This letter is the Attorney General's order on your petition for review of the denial by the Oregon University System (OUS) of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on February 4, 2011, asks that the fees be waived because your request is in the public interest. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law also authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost" in making records available. ORS 192.440(3). ORS 192.440(5) authorizes a public body to waive fees if it determines that the waiver is in the public interest "because making the record available primarily benefits the general public." Under ORS 144.220(5), "a person who believes that there has been an unreasonable denial of a fee waiver * * * may petition the Attorney General * * * in the same manner as a person petitions when inspection of a public record is denied."

In your public records request, you requested a fee waiver "on the basis of public interest, which I can demonstrate on request." Harbaugh email dated February 4, 2011. On February 4, 2011, Charles Triplett, Board Secretary of OUS Office of the Chancellor, advised you that the cost to fulfill your request would be $29.59, based on the need to retrieve documents from the OUS archives and to make a minimum of four paper copies of those documents. Triplett email dated February 4, 2011. Mr. Triplett also advised you that your request for a fee waiver was respectfully denied. *Id.*

OUS had authority to waive fees for responding to your records request only doing so would be in the public interest "because making the record available primarily benefits the general public." ORS 192.440(4). The Oregon Court of Appeals has stated that, under this test, fee waiver is authorized if "the most important or significant utility or advantage" of the record to be disclosed "accrues to the public." *In Defense of Animals v. OHSU*, 199 Or App 160, 189, 112 P3d 336 (2005).

In determining whether the requester has established that disclosure would primarily benefit the public, relevant factors include: the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. *Id.*

You sought records pertaining to "4 payments to the U.S. Treasury totaling $7,225." Harbaugh email dated February 4, 2011. You opine that the payments are a penalty for Maid in Oregon's "non-payment of withholding taxes in a prior year, or something similar[.]" *Id.* You requested "contracts, letters, or other documentation explaining these payments." *Id.* In a February 8, 2011 email that you copied to OUS Board Secretary Charles Triplett, you opined that the payments could be the result of a "financial impropriety."

Mr. Triplett also advised us that the payments to the U.S. Treasury were for contract costs that OUS was obligated to pay to Maid in Oregon under its contract with Maid in Oregon but had not yet paid. The payments were made to the U.S. Treasury rather than to Maid in Oregon because Maid in Oregon itself owed payments to the U.S. Treasury. Because Maid in Oregon owed payments to the U.S. Treasury, OUS was required by a notice of levy from the U.S. Treasury to pay its contractual obligation to the U.S. Treasury rather than to Maid in Oregon. Having now reviewed the documents provided to you by Mr. Triplett, they appear to confirm that the U.S. Treasury directed OUS to pay to the U.S. Treasury amounts that OUS was "already obligated to pay" to Maid in Oregon. The levies specifically instructed that, if OUS did not owe money to Maid in Oregon, OUS was to simply fill out a form to that effect. The billing statements provided to you by Mr. Triplett support that OUS actually owed those amounts to Maid in Oregon – and scrutinized the invoices before making payment. Thus it does not appear that OUS was paying penalties on behalf of Maid in Oregon. Instead, OUS appears to have been paying to the U.S. Treasury only amounts it would otherwise have paid to Maid in Oregon.

As for the total amount of the payments, Mr. Triplett advised us that the figure was approximately half that of the previous payments to Maid in Oregon because, by the time of the notice of levy to pay its obligation under the contract to the U.S. Treasury, OUS had changed its contract with Maid in Oregon. The new contract obligated Maid in Oregon to provide biweekly, rather than weekly, cleaning services, and required OUS to pay about half as much.

We conclude that there is a public interest in information about these seemingly unusual payments, and that disclosure of this information would primarily benefit the public, rather than you personally. Although Mr. Triplett's explanation was reasonable and perfectly plausible, the Public Records Law serves an important purpose by permitting the public to insist on

documentation of such a narrative. It follows that OUS had the discretion to waive the fee assessed for disclosure of the documents you requested.

By itself, however, that does not mean that OUS was required to waive or reduce its fees. According to the Court of Appeals:

> [E]ven if the public body determines that the requestor meets [the public interest] test, the public body is not required to grant the fee waiver or reduction. Rather, it "may" do so; that is, the public body has discretion whether or not to grant a fee waiver or reduction.

In Defense of Animals, 199 Or App at 189. In exercising that discretion, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.* at 190. To determine whether OUS's decision with respect to the waiver request was reasonable, we must "examine the totality of the circumstances presented." *Id.* at 189-190. A public body's decision must be upheld if it is objectively "reasonable" under all of the circumstances presented.

We cannot conclude that OUS unreasonably denied your request. Based on the information available at the time of OUS's decision, it was unlikely that the records would disclose the impropriety you suggest. Moreover, the amount of the fee charged by OUS did not present a significant obstacle to the public interest served by disclosure. Although waiving a $30 fee would not burden OUS, we are aware that you have made numerous public records requests of OUS in recent months, and OUS has generally agreed to waive the associated fees. We have long indicated that the overall volume of your records requests is relevant to assessing the reasonableness of decisions on fee waiver issues. *See, for example*, Public Records Order, February 26, 2009, Harbaugh at 2-3. Because we cannot conclude that charging you approximately $30 in this case was unreasonable, we deny your petition.

Sincerely,

KEITH S. DUBANEVICH
Chief of Staff and Special Counsel
to the Attorney General

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c: Charles Triplett, Board Secretary, OUS